



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIRBI
ENVIRONMENTAL & LAND DIVISION

ELC NO. 528 OF 2012

STRAMAN EAST AFRICA LIMITED.....PLAINTIFF

-VERSUS-

HASSAN GUYO WAKALO.....DEFENDANT

JUDGMENT

1. The Plaintiff is the registered proprietor of all that property known as Land Reference No. 209/11148 Nairobi (“the suit property”). The Plaintiff bought the suit property at a public auction in 2009. The Plaintiff holds a Provisional Certificate of Title No. IR 48619 issued on 6th May, 2010 under Section 71 of the now repealed Registration of Titles Act (Cap 281) Laws of Kenya.
2. Following such recognized proprietorship the Plaintiff sought to have possession of the property but found the Defendant in occupation. On 6th October, 2010 the Plaintiff formally notified the Defendant and also sought that the Defendant deliver vacant possession of the suit property. The Defendant did not vacate. The Plaintiff then hurried to court and took out these proceedings. The Plaintiff also prompted criminal proceedings against the Defendant. The Defendant was convicted for forcible detainer in the criminal case.
3. The Plaintiff was successful in these Civil proceedings and obtained summary judgment and a preliminary decree for vacant possession. The Defence was held not to be plausible. The Defendant was held a trespasser and the Plaintiff held entitled to possession. Having entered summary judgment for vacant possession under Order 36 of the Civil Procedure Rules, the learned judge then stated as follows:

“Since the Plaintiff has a claim for mesne profits, the Plaintiff will be at liberty to set the suit down for formal proof for assessment of mesne profits”.

It is that holding that constitutes the genesis of this judgment. The plaintiff immediately set to have the court assess the Plaintiff’s mesne profits. Prior, the Plaintiff had extracted a decree. It is noted that perhaps due to the learned judge’s obiter re-stated above the decree did not conform with the provisions of Order 21 Rule 13(1) of the Civil Procedure Rules. The learned judge had made no specific order for inquiry for payment of mesne profits but simply stated that the Plaintiff was at liberty to set the suit down for assessment of mesne profits. I would however read the learned judge’s sentiments to mean that an inquiry as to payment of and quantum of mesne profits was to be formally conducted.

4. It is not therefore surprising that the Plaintiff immediately fixed the case for formal proof even after vacant possession had been obtained.
5. The case came up for formal proof on 16th October, 2014. The Plaintiff was represented by Mr. Kahonge. Mr. H. Kinyanjui who was on record for the Defendant asked to be excused from the proceedings when his application for adjournment was denied by the court.
6. The Plaintiff called two witnesses. PW1, a director of the Plaintiff Company testified as follows. That the Plaintiff had since 2010 sought possession of the suit property to no avail. Possession was finally obtained in November, 2013 after eviction orders were issued by the court. Through that period the Plaintiff was unable to utilize the suit property. The Plaintiff had suffered loss. PW1 put the loss at Kshs. 75,000/= per month from October, 2010 through November, 2013. PW1 also asked for costs. PW1 produced documents marked PExh 1 and 2 being the bundle of documents to demonstrate and support the Plaintiff's case for mesne profits.
7. The second witness PW2 was Mr. Michael Mwangi. He is a registered property valuer. He has practiced as a valuer since 2006. He confirmed having visited the suit property to assess the rental value. He assessed this at Kshs. 75,000/= per month. He justified the figure on the basis of comparables. The comparables which PW2 told the court were a minimum of 3, were the neighboring property rentals of even user. PW2 testified that after appropriately adjusting the comparables using the set guidelines of registered valuers, he arrived at the figure of Kshs. 75,000/= per month. The comparables were vacant land let out and developed by the tenants. PW2 produced a list of the comparable properties used. This was marked PExh-3B by the court. PW2 also produced a detailed valuation report (PExh-3) explaining the valuation methodology and returning the monthly rental value of 75,000/= for the suit property as of November, 2013.
8. The issue for determination is whether the Plaintiff is entitled to mesne profits as compensation for the period the Plaintiff did not have possession of the suit property and if so the quantum thereof.
9. Counsel for the Plaintiff has submitted that the Plaintiff is entitled to damages in the form of mesne profits. Counsel relied on the definition of mesne profits found in Black's Law Dictionary, 2nd edition which states that mesne profits is the "*immediate profits i.e. profits which have been accruing between two given ... value of the or occupation of land during time it was held by one in wrongful possession and is commonly measured in terms of rent and profit*".

Counsel also relied on the case of **David Odhiambo Owino –v- the Board of Trustee Civil Case No. 1242 of 2004** (unreported) to the effect that once summary judgment has been passed for recovery of land, mesne profits can be left for trial as it must be proved. Counsel further relied on the case of **Inverugie Investments Ltd –v- Hackett [1995]3 All ER 841 [1995] WLR 713**, where the privy council held that one who was deprived of the use of his property is entitled to recover damages in the form of mesne profits. Both cases, as well as Black's Law Dictionary were cited with a view to convincing the court that mesne profits was available as damages in actionable ordinary trespass.

10. In the case of **Mwya Wa Kitavi and Another –vs- Peter Kitemwa Muia NRB ELC No. 10 of 2013**, where the claimant alleged trespass and sought eviction orders as well as mesne profits of Kshs. 3,000/= per month, I rendered myself as follows:

*“The Plaintiffs sought the damages in the form of mesne profits which means “the profits of an estate received by a tenant in wrongful possession between two dates”. see Black’s Law Dictionary 9th Edition. In legal parlance, it is the name given to damages for trespass brought by a landlord against his tenant where the latter fails to quit demised premises upon termination of a lease: see **Bramwell vs. Bramwell [1942] 1KB 370**. It must arise from that particular relationship of landlord and tenant. It is one of the few ties, which continues to bind the landlord-tenant relationship after termination. It is also the position in law that mesne profits are to be claimed by the landlord at the rate of the letting value of the premises without the need to prove that he could have let the*

premises during the period of the tenant's continued illegal occupation. This remedy is however not available, in my view, to ordinary trespass and illegal continued occupation, where the remedy available would be a remedy in injunction and or in damages for illegal intrusion (trespass) which damages may be ordinary general damages or proven special damages in addition to any aggravated damages where the trespass is high handed and insolent: see **Jolliffe –v- Willmet & Co. [1971]1 All ER 478**".

11. These words are wide. The court then intended to say simply that mesne profits is not available as a head of damages for a claimant where the action is in trespass *quare clausum fregit*. Those observations indicate pretty clearly that, in my view, mesne profits is not available unless there existed a landlord-tenant relationship, where the tenant then becomes the trespasser. In such a case there is an action in trespass for mesne profits. As stated in Strouds Judicial Dictionary of Words and Phrases (2000 Ed).

"The expression "mesne profits" is only another term for damages for trespass arising from the particular relationship of landlord and tenant". (emphasis)

There is judicial explication on this point too: see **Bramwell –v- Bramwell [1924] 1 K.B 370**. The court in that case stated that mesne profits is recoverable only on the basis of a collapsed landlord-tenant relationship. I would entirely agree.

12. In the instant case there was previously no such landlord and tenant relationship. Instead the Plaintiff came into the picture when the Defendant was on the land already. The Defendant's action in keeping possession, remaining on the suit property and placing items on the same made his actions actionable *quare clausum fregit* [he broke the close]. The Plaintiff could not seek to recover any profits wrongfully made by the Defendant even by way of rent. Instead the Plaintiff was entitled to general damages: see **Jaggard –v- Sawyer [1995] 2 All ER 189**. It is a "retrospective compensation for past wrongs" per Sir Thomas Bingham MR at page 196 of the same law report.

13. The claimant is however not to be limited to nominal damages. Substantial money remedy, in my view may be awarded if there has been diminution in the value of land which has been put to waste by the trespasser. Substantial money remedy may also be awarded without any proof of loss on the claimants part: see **Inverugie Investment Ltd –v- Hacket [1995]1 WLR 713 at 718 per Lord Lloyd of Berwick**. The claimant need not demonstrate that he could have let the land for substantial commercial gain: see **Inverugie (supra) at page 717 per Lord Lloyd of Bermick**. Besides the compensatory damages to be awarded by the court, the court, when called upon may award aggravated damages. The aim of award of damages though is to ensure that there is sufficient compensation and restitution. It is to be noted too that in the *Inverugie* case there was a relationship of an owner and a long term lessee.

14. In my view, to pay an award of damages in an actionable trespass *quare clausum fregit* based on rentals would be to make that wrong assumption that the claimant has incurred an equivalent loss and the trespasser has in turn incurred a profit by reason of the trespass. As mesne profits are specific in nature, the assumption that the claimant in a trespass *quare clausum fregit* would have had a tenant paying the equivalent rent, but for the trespass, is and would be erroneous. There is no basis in law to make such an assumption.

15. Let me add that damages in trespass *quare clausum fregit* are awarded on the basis of a "user basis" and it does not matter that the Claimant cannot show loss or damage: see **Bocardo v Star Energy UK Onshore Ltd [2010] 3 WLR 654** where the case of **Whitwham v Westminster Brymbo Coal & Coke Co [1896]2 Ch 538**, also to the same point, was applied.

16. In trespass, the nature of the cause of action is therefore material. The claim herein was in trespass *quare clausum fregit* and not one arising out of a landlord-tenant relationship. I would only assess general damages but not mesne profits. I see no reason why damages should not be assessed by

the court in the present case. It is not necessary for a claimant to include a claim for damages in his plaint. The discretion is in the court to award damages in an action for trespass *quare clausum fregit* when the court thinks fit: see **Betts –v- Neilson [1868] LR 3Ch App 429**. The reasoning is that it would be absurd to have the Plaintiff include a claim for damages in his plaint when he is insisting on his right to an injunction or specific performance and then resist the Defendant’s retort that the Plaintiff should be contented with damages. In short, once you claim damages how then do you state that damages will be inadequate. But the plaintiff ought to make it clear that he also seeks damages for the injury occasioned by the trespasser.

17. My reading of the Plaint is clear that the Plaintiff always wanted to claim damages in trespass although mistakenly as mesne profits. The Plaintiff has shown that despite demand the Defendant’s unlawful acts continued. The acts only ceased following enforcement of a court order of eviction. In the meantime, for the Defendant’s illegal acts of trespass the Plaintiff continued to suffer loss. I am satisfied that the Plaintiff would have been entitled to damages even if the claim for delivery up of vacant possession had not been made.

18. The Plaintiff did not suffer any specific or special damages and neither was any pleaded. The evidence by PW2 is to the effect that the suit property was not developed. The Defendant did not construct anything on the property. The Plaintiff need not restore the property to its original state. It is still apparently in the original state. As trespass is actionable per se and in the circumstances of this case, I award the Plaintiff the amount of Kshs. 500,000/= as general damages in compensation for the infringement of the Plaintiff’s right to use and occupy the suit property. I do not believe the same to be so inordinately low or high in the circumstances of this case. That would be a fair and reasonable compensation for the Defendant’s act of trespass.

19. The claim for mesne profits is however disallowed.

20. The Plaintiff will also have costs of the suit.

Dated, signed and delivered at Nairobi this 5th day of December, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

.....for the Plaintiff

.....for the Respondent